IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RAMONA R. TAVAREZ and DANNY TAVAREZ, wife and husband, Plaintiffs/Appellees, v. CYNTHIA Y. BRACAMONTE-DAVIS and RICHARD DAVIS, wife and husband, Defendants/Appellants.	2 CA-CV 2006-0110 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C2006-0299

Honorable Michael D. Alfred, Judge

AFFIRMED

Robert Michael Hersch — Tucson
Attorney for Plaintiffs/Appellees

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By Stephen M. Weeks — Tucson
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V Á S Q U E Z, Judge.

¶1 Cynthia Bracamonte-Davis and her husband, Richard Davis, appeal from the trial court's denial of their motion for relief from judgment made pursuant to Rule 60(c), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. For the following reasons, we affirm.

Background

¶2 In July 2005, Richard Davis bought a home in the Casa Primera subdivision as his sole and separate property. Cynthia signed a disclaimer deed, stating that she had "no past or present right, title interest, claim or lien of any kind or nature whatsoever in, to or against" the property. A homeowners' association was established in Casa Primera that employed a property manager, collected monthly assessments from homeowners, and had an elected board of directors. The association had apparently been incorporated as a non-profit corporation in 1996, as required by the Declaration of Protective Covenants, Conditions, and Restrictions for Casa Primera. But the corporation was administratively dissolved in March 2002, apparently because the association failed to file required paperwork with the Arizona Corporation Commission. The homeowners elected appellee, Ramona Tavarez, as the president of the association in September 2002.

¶3 In November 2005, Cynthia filed articles of incorporation with the corporation commission for "Casa Primera Homeowner's Association." She named herself, Richard, and Marcos Valencia as directors of the corporation. After forming the corporation, Cynthia obtained an income summary from the property manager showing the association had collected $29,801.43 from its members between December 1, 2003, and December 5, 2005,

and had $9,318.10 in reserve funds. Apparently believing that appellees Ramona Tavarez and her husband Danny Tavarez had misappropriated the funds, Cynthia filed and recorded a non-statutory notice and claim of lien in Pima County against the Tavarezes' home in December 2005. She listed the claimant on the lien as "Cynthia Bracamonte-Davis/Casa Primera HOA." The lien further provided: "Said debtor is indebted to claimant in the amount of $39,119.53, with respect to monies owed to Casa Primera Homeowner's Association from December 1, 2003 to December 5, 2005."

¶4 In January 2006, the Tavarezes filed a complaint in Pima County Superior Court against the Davises, claiming Cynthia had filed the lien in violation of A.R.S. § 33-420. That statute provides, in pertinent part:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

¶5 After an order to show cause hearing, the trial court found that the lien had been recorded in violation of § 33-420(A) and that the Davises "knew or had reason to know at the time said lien was recorded that Defendant Cynthia Bracamonte-Davis was not a homeowner within the Cas[a] Primera Homeowners Association, was not a member of said Homeowners Association and had no authority to act on behalf of said Homeowners

Association." The trial court ordered that the Davises immediately remove the lien and pay the Tavarezes $5,000 in damages plus attorney fees and costs, pursuant to the statute. The Davises filed a motion for a new trial, pursuant to Rule 59(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. After the Tavarezes responded, the Davises filed a reply, which included a Rule 60(c) motion for relief from judgment.

¶6 In their Rule 60(c)(4) motion, the Davises argued that the homeowners' association was "an indispensable defendant" under Rule 19, Ariz. R. Civ. P., 16 A.R.S., Pt. 1, because it was the "claimed lienor." They, therefore, claimed that the judgment was void because it was obtained without the association having been joined as a party to the lawsuit. *See* Ariz. R. Civ. P. 60(c)(4) (providing for relief from judgment on the ground the judgment is void). Relying on Rule 60(c)(5), the Davises also argued it would be "inequitable for the judgment to proceed against them individually for official acts performed by the corporation when the corporation is not a party and was not held liable." *See* Ariz. R. Civ. P. 60(c)(5) (providing for relief from judgment on the ground "it is no longer equitable that the judgment should have prospective application"). The trial court denied both the Rule 59(a) motion and the Rule 60(c) motion. This appeal followed.[1]

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[1]Although the Davises' notice of appeal stated the Davises were appealing from the trial court's denial of both their Rule 59(a), Ariz. R. Civ. P., motion and their Rule 60(c), Ariz. R. Civ. P., motion, they address only the Rule 60(c) motion in their appellate briefs. Thus, they have abandoned any claim of error in the trial court's denial of their Rule 59(a) motion. *See Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 208 Ariz. 176, ¶ 17, 91 P.3d 1019, 1023 (App. 2004) (issues not raised in opening brief are considered abandoned).

Standard of Review

¶7 We review the trial court's denial of a motion for relief from judgment for an abuse of discretion. *Fry v. Garcia*, 213 Ariz. 70, ¶ 7, 138 P.3d 1197, 1199 (App. 2006).

Discussion

¶8 As they did in their Rule 60(c) motion, the Davises argue that the Casa Primera homeowners' association was a necessary and indispensable party to the Tavarezes lawsuit under Rule 19, and the judgment entered in the association's absence was, therefore, void. The trial court found this issue had not been properly raised below, apparently because it was raised for the first time in the Davises' Rule 60(c) motion in their reply. We need not determine the correctness of this ruling, however, because we find the trial court did not abuse its discretion in any event in denying the Davises' Rule 60(c) motion.

¶9 A judgment is void if it was "rendered by a court which lacked jurisdiction, either of the subject matter or the parties," *Cockerham v. Zikratch*, 127 Ariz. 230, 234, 619 P.2d 739, 743 (1980), or "to render the particular judgment or order entered." *State v. Cramer*, 192 Ariz. 150, ¶ 16, 962 P.2d 224, 227 (App. 1998). A judgment is not void merely because it was rendered in the absence of an indispensable party. *City of Flagstaff v. Babbitt*, 8 Ariz. App. 123, 127, 443 P.2d 938, 943 (1968). Thus, it is irrelevant here whether the association was an indispensable party because, even assuming it was, the judgment rendered in its absence would be at most "erroneous" but not void and subject to being vacated under Rule 60(c)(4). *See Cockerham*, 127 Ariz. at 235, 443 P.2d at 744.

¶10 The Davises rely on two cases for their proposition that the judgment entered in the absence of the association was void. The first case they cite, *Agri-Tech Ltd. v. North American Bank*, No. 1 CA-CV 89-145 (filed December 20, 1990), was subsequently ordered depublished by our supreme court on June 4, 1991. Their citation of and reliance on that case is, therefore, inappropriate, and we do not consider it. *See Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 27, 122 P.3d 6, 14 (App. 2005), *quoting* Ariz. R. Civ. App. P. 28(c), 17B A.R.S. ("unpublished decisions 'shall not be regarded as precedent nor cited in any court'").

¶11 The Davises also rely on *Ballard v. Lawyers Title of Arizona*, 27 Ariz. App. 168, 552 P.2d 455, 457 (1976), but their reliance on that case is misplaced. In that case, Division One of this court found that owners of real property subject to a mechanic's lien were necessary parties to a lawsuit to foreclose the lien "without whose joinder no valid, enforceable judgment can be rendered." *Id.* at 170, 552 P.2d 457. The court further stated: "If the sole defendant in a suit to enforce a lien has no interest in the property . . . at the time the lawsuit was filed, there is nothing upon which to base the lien and the judgment is void." *Id.* However, it appears that the court in *Ballard* used the term "void" when it really meant "voidable" because the trial court was not without jurisdiction to render the judgment but, rather, had jurisdiction over the subject matter and the parties before the court but entered a judgment that was unenforceable. *See id.; see also Cramer*, 192 Ariz. 150, ¶ 16, 962 P.2d at 227 (explaining distinction between void and voidable judgments); *see also Cockerham*,

127 Ariz. at 234-35, 619 P.2d at 743-44 (describing courts' often inaccurate use of term "void").

¶12 The Davises nonetheless argue the judgment is void because the trial court lacked "subject matter jurisdiction" over them. They rely on A.R.S. § 10-3612, which immunizes members of a corporation from liability "for the acts, debts, liabilities or obligations of the corporation."[2] But even assuming the corporation itself had authority to act on behalf of the association and that Cynthia was a board member by virtue of declaring herself one in the articles of incorporation, there is no evidence that Cynthia acted on behalf of the corporation when she filed the lien. She presented no evidence below that the board of directors had authorized her to file the lien. She did not present any minutes from a meeting of the association or the board at which she was given such authority by a majority vote of a quorum of directors, *see* A.R.S. § 10-3824, nor did she present a written consent signed by all the directors authorizing her to file the lien, *see* A.R.S. § 10-3821. *See also* A.R.S. § 10-3140(2) (defining act of corporation's board of directors); A.R.S. § 10-11601(A) (requiring corporation to keep permanent records of minutes of meetings and of all actions taken without a meeting). Therefore, § 10-3612 has no application here because

[2]Although this statute was not mentioned below in their Rule 60(c), Ariz. R. Civ. P., motion, the Davises argued below that it was "inequitable for the judgment to proceed against them individually for official acts performed by the corporation." Thus, we address their argument although it is phrased differently on appeal than it was below.

the filing of the lien did not constitute a corporate act. The trial court's judgment held Cynthia (and Richard) liable for her personal act.

¶13 Having found no basis for the Davises' arguments that the judgment is void or otherwise improper, we further find no abuse of discretion in the trial court's denial of their Rule 60(c) motion. The trial court's order is, therefore, affirmed.

Attorney Fees

¶14 The Tavarezes have requested an award of attorney fees and costs on appeal, pursuant to A.R.S. §§ 33-420, 12-341.01(C), 12-349, and 12-350. Because we award the Tavarezes their reasonable attorney fees and costs pursuant to § 33-420(A), upon their compliance with Rule 21(c), Ariz. R. Civ. App. P., 17B A.R.S., we do not determine their entitlement to fees on any other basis.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge